JD–168–98
New London, CT

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FIRST HEALTH CARE, INC. d/b/a
NUTMEG PAVILION HEALTH CARE
FACILITY, A WHOLLY OWNED
SUBIDARY OF VENCOR, INC.

And Case No. 34–CA–8073

LEANNE DARLING, AN INDIVIDUAL

Margaret A. Lareau, Esq.,
Of Hartford, Connecticut
For the General Counsel

Thomas R. Gibbons, Esq.,
Of Hartford, Connecticut
For the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut on May 11, 12, and 13, 1998. The charge was filed on October 14, 1997[1] and the final amended complaint was issued April 27, 1998. The complaint alleges that Nutmeg Pavilion Health Care Facility, a wholly owned subsidiary of Vencor, Inc., (herein Respondent or Nutmeg) discharge its employee Leanne Darling on April 25, 1997 because she engaged in union or other protected concerted activity.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, engages in providing skilled nursing care to the public at its facility in New London, Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health

[1] All dates are in 1997 unless otherwise indicated.

[2] The instant case was consolidated with two others, 34-CA-7808 and 34-CA-7813. These cases settled shortly after the record was opened. I issued an Order severing them and remanding them to the Regional Director, who thereafter approved requests by the charging parties in those cases to withdraw their charges.

care institution within the meaning of Section 2(14) of the Act. Respondent further admits that Local 919, United Food and Commercial Workers Union (herein Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background and Issues for Determination

Nutmeg is a facility for the long term or permanent care of patients as a primary service, though it has 23 beds for short-term patients. In all the facility has 140 beds, of which 46 are for Alzheimer's patients. In January 1996, Vencor, its present owner, purchased the facility. About 200 employees work at Nutmeg, of which about 105 are in nursing. The chain of command in the nursing department is that certified nursing assistants (CNAs) report to their charge nurse, either a licensed practical nurse (LPN) or registered nurse (RN). The charge nurses report to the nurse supervisors, who in turn report to the Assistant Director of Nurses (ADN) or the Director of Nurses (DN). In addition, there are some administrative nurse positions such as medicare nurse, occupational health care (OSHA) nurse, resident care plan coordinator and staff development nurse. These administrative nurses report directly to the ADN or Director of Nurses. At all times material to this proceeding, Sharon Murphy was the facility's Administrator, May (Mindy) Manqual was its Director of Nursing and Jan Sharp was its Assistant Director of Nursing.

Nutmeg is now and has been a non -union employer. Beginning in the spring of 1996 and ending in early 1997, the Union engaged in a campaign to organize certain of Nutmeg's employees at its New London, CT facility. The Union filed a petition for representation on May 21, 1996, seeking to represent two units of employees, one including certified nursing assistants and service and maintenance employees, and the other, licensed practical nurses. An election was held on July 11, 1996 and the Union lost the election in both units. It filed objections and the Board's Hearing Officer determined that a rerun election should be held. This determination was upheld by the Board on November 8, 1996. The rerun election was held only in the proposed CNA and service and maintenance employee unit on December 4, 1996 and the Union again lost the election. The Respondent opposed the Union's effort to organize Nutmeg's employees during the campaign, insofar as this record reveals, primarily through the devise of meetings by management with employees where the employer's views were made known.

One of the Union's chief supporters was the Charging Party, LPN Leanne Darling. After the campaign ended in early 1997, she engaged in an act alleged to be protected concerted activity. About a month and a half later, on April 25, 1997, Darling was discharged by Respondent. The Complaint alleges that her discharge was motivated by Darling's support for the Union, her union activities and/or her protected concerted activity. Respondent denies this was the case and asserts that Darling was discharged for insubordination and failing to follow proper procedures for calling in an absence occasioned by illness.

B. The Facts Surrounding Darling's Discharge

1. Darling's Union Activity and Her Alleged Protected Concerted Activity

The Charging Party, Leanne Darling, was employed by Nutmeg as a LPN from January 1990 until her discharge in April 1997. General Counsel introduced into evidence several performance evaluations for Darling given during her employment with Nutmeg. All of them, including the last one given in June 1996 indicate Darling's performance was satisfactory or

better. Thus we are considering action taken against a clearly adequate employee. At the time of her termination, she worked the 11 pm to 7 am shift . Until about February 12, 1997, she had worked for some time on the Alzheimer's wing. After that date, she worked for a while on center wing and then for about three weeks, until her discharge, she worked on north wing. While she worked on Alzheimer's, her supervisor was Joyce Chappel, and her fill-in supervisor was Marie Boiselle. Full staffing on her shift was one LPN and two CNAs. Darling was charge nurse on the wing during her shift. She did medication passes, gave treatment and oversaw the work of the CNAs.

Darling actively supported the union campaign throughout. During the course of the campaign from May to December 1996, the Union conducted employee meetings. Darling attended most of these meetings, was vocal in her support of the Union and secured authorization cards from other employees both in the facility and away from it. On four occasions she solicited signatures in front of the Nutmeg facility. Darling was the main union supporter and organizer on the night shift, a fact corroborated by the testimony of LPN Dale Munn. She also wore a union button on her uniform.

On the night shift ending February 10, 1997, Darling wrote a letter and delivered the letter with an attachment to Respondent, with copies to both Manqual and Murphy. Darling's letter dealt with a controversy involving Nutmeg CNA Quinn Easterling, who on February 7, had been removed from night shift and suspended as a result of an altercation and conflict with a co-worker on that shift, CNA Sarah Emerson. Emerson had accused Easterling of being abusive and threatening. As of the time Darling wrote her letter, Emerson had not been disciplined for her part in the incident. Darling was prompted to write the letter because Darling understood that Emerson had told management that everyone on the wing was afraid of Easterling, something Darling strongly believed was not true. Darling attached to all copies of her letter, including Mangual's and Murphy's, signed written statements which she obtained from three co-workers who she had asked to document their views that they were not afraid of Easterling. Darling told the workers to whom she spoke that if they were not afraid of Easterling, she would like them to put it into writing so that she could hand it into the office because she felt it was not right that one person (Emerson) was speaking for everyone.

Darling's letter dealt with several topics tied to Easterling and Emerson. She praised Easterling's job performance. She related Emerson's prediction that Easterling was leaving and Emerson's expressed desire for Easterling's shift assignment when Easterling left. Darling related Emerson's statement indicating fear of black persons (Easterling is black). Further, in the letter she stated that:

> "I have spoken to most of the CNAs on my shift. They all state they are not & never had any reason to fear Quinn. They stated she was no problem to work with. It seems Some people don't want to put this in writing. They have stated that if you called them & asked, they would tell you that they didn't have a problem working [with] Quinn but they didn't want to be involved."

She noted Easterling's urging that she (Darling) not "stick her neck out " further. Darling criticized Emerson generally, and criticized Emerson's role in a recent incident involving Alzheimer's patients, claiming Emerson had made false accounts against her in that incident.[3] She was critical of Emerson on a number of points, indicated discomfort working with Emerson,

[3] As will be shown at a later point, this was true and Manqual knew the Emerson's accusation against Darling was false.

and noted that she would rather work along side one Easterling, who was honest, than ten Emersons. Finally she admitted her anger, and explained that she was upset about the "decision" that had been made regarding Quinn. The attached signed statements of three employees (Idella Willougby, Irene Stokes, and Tania Castro-Watts), which were all written on one sheet of paper, varied somewhat in content, but overall focused on Easterling's good qualities as an employee, on not being afraid of Easterling, on enjoying working with her, and on the view that one person's opinion shoudn't keep Easterling off a shift and that if anyone had trouble working with Quinn, it was brought on by that employee.

Darling's solicitation of support among employees, solicitation of signed statements from those employees, and submission to Respondent of those signed statements, including her own, were clearly protected concerted activities under Section 7 of the Act. The term "concerted activity" includes the activities of employees who have joined together in order to achieve common goals. *NLRB v. City Disposal Systems,* 465 U.S. 822 (1984). That is precisely what Darling was leading her fellow employees to do here – she told them the purpose of the letter and that it would be submitted to Respondent, and they joined in that purpose by writing and signing statements – three of them in concert on one piece of paper and giving the statement to Darling. In general, for an employee's activity to be "concerted", it must be engaged in with or on authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries,* 268 NLRB 493, 497 (1984). Here Darling engaged in the activity with the other employees, and by their return of the statements to her for submission to Respondent, they were giving her authority to act and she was not acting alone.[4]

In this regard, Darling's letter actually described to Respondent her protected concerted activities. Specifically, in that letter she set forth the fact that she had spoken to all of the CNAs on her shift, and that they all stated they did not fear Easterling. She described their fear of putting this in writing, and their willingness to respond to inquiries of Manqual about the matter.[5] Finally, though Darling's letter did include some justified personal criticism of Emerson, its primary thrust and the thrust of the statements of the employees joining in the letter, was to insure fair treatment of Easterling. I find that Darling's solicitation of support for Easterling from other employees, and the submission of her letter with attachment furthering this purpose are classic examples of protected concerted activities under Section 7 of the Act.

2. Following Delivery of the Letter to Respondent, Darling is Disciplined.

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[4] Manqual admitted receiving the letter from Darling on February 11, 1997. She testified that her copy did not have the attachment with the statements of the other three employees. Given Darling's explanation of how she went about putting the letter together, copying it and collating it, I truly believe Mangual did receive a copy. Murphey received a copy of the letter also. She testified, but did not testify that her copy did not have the attachment. Thus it is undisputed that at least one person in Respondent's management received the letter and attachment. In any event no one called into serious question the fact that three other employees did sign statements in support of Easterling and intended them to be submitted with Darling's letter. I find as fact that the other three employees did sign the statements attributed them and joined in Darling's efforts to help Easterling.

[5] As will be discussed below, when Manqual confronted Darling about the letter, she commented that Darling had handed her an "unrequested solicitation", clearly responding to her awareness of that solicitation of other employees, not just to Darling's letter.

In sum, Darling's letter with the attached statement was a concerted submission of several employees on behalf of Easterling and implicitly criticized Respondent's handling of the conflict between Easterling and Emerson. The letter had immediate repercussions. On February 12, the day following the submission the letter, Darling was called into Manqual's office where Manqual told her that she had done a very dangerous thing. She accused Darling of giving her an unrequested solicitation, She then asked if Darling realized how dangerous that was? Manqual added that if she wanted to know more about the Easterling incident, she would have asked for more information. Darling responded that she felt that everyone had the right to speak for themselves and that she did not like one person (Emerson) speaking for everyone. Manqual inquired how one of the other employees signing the document, Tania Castro-Watts, had signed it as she did not work night shift with Easterling. Darling explained that Watts had worked on Alzheimer's with her. Darling also told Mangual that Emerson wanted Easterling's job. She reiterated the point made in the letter that other employees wanted her to know they were not afraid of Easterling and that if Manqual would ask them, they would tell her so. Mangual indicated she did not want to know more about the incident. At this point, Manqual put Darling on probation for an incident that had occurred on Darling's shift on February 1, on the Alzheimer's wing. [6]As will be discussed in detail below, Darling was being disciplined for allowing the two CNAs on her shift to take a break at the same time, leaving Darling alone on the shift. During the absence of the two CNAs, a problem arose with a patient on the wing.

Darling argued it was wrong to punish her for letting her CNAs take a break at the same time as her supervisor allows this to happen all the time. As noted earlier, part of Darling's displeasure with Emerson was Darling's understanding that Emerson had told Manqual that during the February incident on the Alzheimer's wing, Darling had locked a patient in the solarium on the wing. Manqual then brought up the matter of the locked solarium door and Darling told her that the door could not be locked. Darling asked if Emerson was the person who accused her of locking the patient in the solarium and Manqual said yes. Manqual stated that Emerson was only protecting the patients and did not speak from malice, adding Emerson comes into the office for conversations frequently. The conversation ended with Manqual speculating that Darling was burned out from working on the Alzheimer's wing and transferred her to another wing. In her testimony, Mangual admitted that she told Darling that another employee had accused Darling of locking the patient in the solarium. Manqual admitted that she knew that this could not happen because of the locking system. Manqual added that the accusation was clearly false and she only told Darling about it so Darling would be aware of it.

Substantial testimony was offered about the incident, which allegedly was the basis for Darlings probation. On February 1, there was a new patient on the Alzheimer's unit who was not

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[6] Manqual testified that after Darling had been placed on probation, Darling asked Manqual if she had received her letter. According to Manqual, she pulled the letter out and asked Darling why she had written it. Darling stated that she had to defend Easterling with respect to the incident she had had with Emerson. Manqual told Darling that if she needed information from Darling, she would contact her, that the matter did not concern her, and that Darling had not been present for the incident. Mangual denied saying anything about the matter being dangerous and denied the letter played any part in her decision to discipline Darling. I credit Darling's testimony over that of Mangual. All of the plausible evidence indicates that the discipline given Darling on February 12 was given in response to her letter, and the facts surrounding Darling's discharge make it clear that Respondent was seeking a reason to fire her. Thus I find that Manqual's versions of events wherein Darling are involved are clearly suspect and credit Darling wherever her testimony conflicts with that of Manqual.

sleeping.[7] Darling had allowed both CNAs on duty to take a break at the same time because they had been working hard. Almost immediately after they left the wing, the new patient became combative with another patient. Darling brought the patient being hit to the nurses station and called another wing to get her CNAs back on duty. She then found the combative patient attacking yet another patient. She secured the victim and placed this patient at the nurses desk. The combative patient walked away up the hall. Shortly thereafter, two CNAs from another wing responded to Darling's call for help. At about this time, Darling heard glass breaking. The combative patient had gone into the solarium on the wing and was breaking out a window with the window's metal frame. With the help of the CNAs, the patient was removed from the solarium without injury and that room was locked until it could be cleaned. Following procedure, Darling made a report of the incident.

On the day following this incident, Manqual called Darling for an explanation of what had happened. Darling told her and nothing more was said at this point. In a follow up conversation, Mangual related that she had been told that Darling had locked the combative patient in the solarium and that is why the patient was breaking out the window. To demonstrate this was not true, Darling confirmed for herself that the solarium door could not be locked from the inside and informed Manqual of this fact. As noted above, Manqual knew this accusation was false.

Nothing was said to Darling about this incident until Darling received notice of probation almost two weeks later, on February 12. The infraction for which Darling was disciplined was allowing both CNAs on her wing to take break at the same time, leaving the wing understaffed and Darling unable to adequately respond to the incident which occurred with the combative patient. Darling testified that it was not uncommon for both CNAs to take a break at the same time, and on a 2 to 3 times a month basis, the wing was staffed with only one LPN and one CNA. On those occasions, when the CNA took a break, only the LPN remained on the floor. Darling testified that her supervisor, Joyce Chappel, was aware this happened and said nothing to her about it. She also pointed out that during the Union campaign, when management called a meeting with CNAs, they would pull all CNAs off her wing, leaving her to handle the wing alone.[8] Contrary to the rather stilted testimony of supervisors called to testify that it never happens that a wing, including the Alzheimer's wing, is left staffed with only one person, I believe Darling's testimony. Supervisor Boiselle testified that it was not unusual for a wing to be short staffed at night with only one LPN and one CNA. Boiselle smoked and took breaks with other smokers, including Darling. She was aware to times when she and Darling were on break that only one CNA remained on Darling's wing. Darling was not admonished on these occurrences that she was in violation of facility rules. Other instances when all CNAs may be off the wing at the same time, albeit for a short period of time, are in-service meetings and so called "pot luck suppers" held by Respondent.

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[7] Manqual testified about this incident, stating that it occurred on February 4 rather than February 1, as the probation form states. Other documentation shows the date to be February 1 and I find that this is the date the incident occurred. I find Manqual's testimony in this regard to be further evidence of her lack of credibility and further evidence of the pretextual nature of the reason given for Darling's discipline on February 12, 1997.

[8] Darling also described an incident on Alzheimer's which occurred in the year before she was fired. She was on dinner break and one of the Alzheimer's CNAs came off the wing to have a cigarette with her, leaving only one CNA on the floor. During this time, an Alzheimer's patient broke out of the wing and was slightly injured in a fall. No one was disciplined or warned about this incident.

Manqual testified that she investigated the incident and her description of what happened comports with Darling's description. No credible reason was given for her delay in waiting some eleven days between the time she became aware of the incident and her disciplining Darling over the incident. Her excuse in waiting is that she "was out of the building a few days." Even according to Manqual, all Darling did wrong in this situation was to allow both CNAs to go to break at the same time. Manqual knew this fact as early as February 2. If this was truly a violation of rules, it follows that Darling should have been disciplined immediately, if for no other reason, to prevent the same sort of violation from occurring again. Mangual in her testimony also said that following February 12, Darling was transferred to another wing so that a supervisor would be more accessible in observing Darling. Again, the only thing Darling did wrong, even according to Manqual, was to let both CNAs go on break at the same time. If this was so serious that Darling should be placed on a wing where she could be observed by another supervisor, then clearly some urgency was called for in dealing with the situation.

However, I believe the matter was not considered serious by Respondent and that in all likelihood, Darling did absolutely nothing that was not allowed at the facility. There is simply too much credible evidence in the record that it was not a violation of any rule to have only one person on a wing because of breaks, meeting, pot luck suppers and the like. The delay in giving any sort of reprimand to Darling strongly supports this view. Then to give her the most severe punishment of probation serves only to support a finding that the alleged violation was pretextual and that something else was behind the punishment.[9] I believe and find that the discipline issued to Darling on February 12 was triggered by and was in response to her concerted protected activity of giving Respondent her letter the day before. The timing of the response is telling. Without any criticism being leveled by Manqual for some ll days for the February 1 incident, Darling is placed on 90 day probation and transferred off the wing one day after the letter is given to Manqual. Manqual's admonition to Darling that giving her unrequested solicitations was dangerous was a self-fulfilling prophecy.

Further evidence of the pretextual nature of the reason given for the probation can be found in another warning allegedly given Darling on February 12. General Counsel introduced into evidence another employee discipline form dated February 12, 1997. This one represents a verbal and written counseling for excessive absenteeism and tardiness. It purports to document 10 instances of Darling being absent or tardy over a four-month period at the end of 1996 and the beginning of 1997. Darling's signature does not appear on the form and it states that the employee declined to sign it. Darling testified that she had never seen the form until some point during preparation for this hearing. Manqual testified that she gave this form to Darling on February 12, 1997, the date at the top of the form. The line at the bottom where the supervisor signed the form carried a date of January 12, 1997. This date also appears by the notation that the employee declined to sign the form. February 12 is almost a month later than the last date that Darling is shown to have been late or tardy. Darling remembered that in early January she did have a conversation about attendance with supervisor Sharon Breton. Breton did not understand the nature of what caused Darling to have three absences in a 90 day period and when Darling explained, the matter was dropped. If any legitimate reason existed to prepare this form, I believe Breton's misunderstanding may have led to it and it would make sense that the form was not given to Darling in January because it was prepared by mistake. I credit Darling's assertion that she was not given this form on February 12. There is nothing on the form putting Darling on probation which makes any mention of an absenteeism problem. I firmly believe that this form was prepared or at least put in Darling's personnel file at or about the time she was

[9] The Board has often questioned the severity of the discipline in deciding whether a discharge was illegally motivated. See, e.g., *Cone Mill Corp.,* 245 NLRB 159, 157 (1979).

fired for an alleged violation of the Respondent's absenteeism policy to bolster Respondent's case for discharging her.

In the conclusions portion of this Decision I will find that placing Darling on probation on February 12, 1997 was motivated by Darling's protected concerted activity set out above and for no other reason. Under a *Wright Line* analysis, all elements are present to support such a finding.[10] Darling engaged in protected concerted activity. Respondent was abundantly aware of this activity. Respondent, through Manqual, demonstrated animus toward the conduct, calling it "dangerous" and then taking immediate discriminatory action against Darling. Clearly Respondent has not demonstrated that it would have taken the same action in the event Darling had not engaged in protected activity. Indeed, given the period of time that passed between the alleged rules violation and the punishment, a much better argument can be made that absolutely nothing would have happened to Darling had she not engaged in protected activity. Accordingly, I will find this discriminatory action by Respondent constitutes an independent violation of Section 8(1) of the Act. [11]As can be seen from the evidence, the matter was fully litigated and to remedy the violation will not result in any additional expense to Respondent, but will allow for the probation to be expunged from the personnel records of Darling and insure this unlawful discipline will not be used against her in the future.[12]

Subsequently, Darling received another counseling, without further discipline. It states that Darling sustained a needle stick and failed to report it for five to six weeks in violation of facility policy. The counseling is undated and Darling remembers receiving it either at the end of March or the beginning of April. The counseling arose out an incident where Darling have given an insulin injection to a patient and when she removed her gloves, she saw a spot of blood on the cuticle of one finger. She had not felt anything, but washed her hands and put disinfectant on the spot. She inspected her glove, but could find no evidence of a needle prick. A few weeks later, Darling learned that the patient she had given the insulin had subsequently gone to a hospital and had a very serious infection which could be transmitted by blood. Though she was worried about her status, being on probation, her concern over possibly contracting the infection caused her to seek out Manqual. She asked if she could be tested to determine if she had contracted the infection. According to Darling, Manqual was cordial and said they would have her tested. Darling then spoke with facility's OSHA Nurse, who sent her to be tested. Darling had a conflict with the doctor they sent her to and she left without being tested. She reported this to management by slipping a note under Manqual's door. The following day, she was summoned to a meeting with Manqual, Sharp and the OSHA nurse. They insisted she be tested and so she made an appointment with Dr. McDermott. Darling was tested and then given the

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[10] *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083 (1980). See pages 12 and 13 of this Decision for a complete explanation of the Board's analytical test of discriminatory motivation.

[11] The timing of discharges in close proximity to union activity is a well-established factor in inferring illegal motivation. *Haddon House Food Products, Inc.,* 242 NLRB 1057 (1979); *Trader Horn of New Jersey, Inc.,* 316 NLRB 149 (1995); *Sawyer of NAPA,* 300 NLRB 131 (1990). By analogy, the same would apply where protected concerted activity is at issue.

[12] On brief, General Counsel makes a lengthy argument that Section 10(b) would not preclude her presentation and my consideration of the evidence of animus and discrimination occurring more than six months preceding the date of Darling's charge. Although I agree with her presentation in this regard and adopt it herein, I would note that a Section 10(b) defense was not raised in Respondent's answer to the Complaint herein and is thus not a defense in this record.

counseling for not reporting the possible needle stick in a timely fashion.

Manqual testified that Darling was not terminated for this incident, though she was on probation, because Darling was extremely concerned about the matter, Darling was not sure that there had been a needle stick, and Manqual wanted to give her a break. There is another factor involved, noted in the nurses notes of this incident. Respondent's insurance carrier became involved and expressed great concern for Darling in this matter and was following the matter. Moreover, it was never made certain that Darling actually sustained a needle prick.

3. The Circumstances Surrounding Darling's Discharge.

On April 25, Respondent discharged Darling. As noted earlier, the discharge was ostensibly because Respondent found Darling to be a no call, no show and insubordinate to the ADN. The Respondent has a policy that requires employees who are going to be absent for medical reasons to call in to a supervisor and report the absence in advance. Failure to do this will result in the employee being considered a no call, no show. Under the Respondent's policy in effect in April, 1997, the first instance of no call, no show, was to result in a written warning. Any subsequent incidence of no call, no show, would result in termination.[13] Respondent also has a policy of requiring a doctor's note authorizing any absence in excess of three workdays. Respondent introduced a substantial amount of evidence of its past enforcement of its no call, no show rule. If anything, this evidence demonstrates that Respondent does not enforce the rule uniformly. However, I do not believe this evidence is really pertinent to Darling's situation as, for reasons detailed below, I do not believe she was in fact a no call, no show.

In April, a few days before her discharge, Darling got a bad case of poison ivy. For two nights she worked with this condition. However, it worsened and she called in on April 19 and spoke with the day supervisor Barbara Turner. She informed Turner of her condition and that she was not coming in to work that night. On the next day, April 20, she again called in sick. She was scheduled to be off duty the following two nights. She was scheduled to resume work on the night of April 22.[14] During the day of April 22, she went to see Dr. McDermott, who is Nutmeg's Medical Directors' partner. Dr. McDermott prescribed medication and told Darling not to go back to work until after April 26. He also gave her a written notation of his directions. Darling left the doctor's office and went to Nutmeg to give the facility her medical excuse for not working the next few days. When she arrived there was no one at the front desk so she went toward the Director of Nursing's office. She passed the office of the facility Payroll Benefits Coordinator, Renee Walker, who asked Darling if she could help.[15] Darling asked for Nursing Director Manqual and was told she was not available. Darling explained why she was there and Walker asked to see the doctor's note. Walker read it and said that if Darling was going to be out of work for more than five days, she would have to put Darling on medical leave of absence.

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[13] The facility has a progressive disciplinary system beginning with a new hire serving a probationary period. After that an employee receives a verbal warning, a written warning, then either a final written warning, suspension or termination or the employee may be placed back on probation. Manqual testified that this system is not always followed, especially in the case of patient abuse, which results immediate suspension and then termination if abuse is found to have occurred.

[14] There appears to be some confusion on dates of events between April 19 and the April 25 termination, accordingly the dates for these events which appear in this decision are the best I can determine from the evidence. The exact dates do not bear on the decision in any event.

[15] Walker's duties include handling personnel files, health insurance and payroll.

Darling said she did not know. Walker then said she would take care of the matter for Darling. Darling asked if there was anything else she should do and Walker said no. Darling thanked her and left.

Walker testified that employees do occasionally bring a doctor's note to her, usually when they cannot find a supervisor. She testified than on these occasions she puts the notes in the letter box of the OSHA Nurse and does not read them. According to Walker, Darling just came to her and gave her a note, indicating it was a doctor's note. Walker testified that she did not ask Darling why she was giving her the note. She told Darling she would take care of the note and give it to the right person. According to Walker, she put the note in the OSHA Nurse's box, because the OSHA Nurse handles all doctor's notes. She testified that between the time she got the note from Darling and Darling's termination, no one from management asked her about the note or her account of her meeting with Darling. Walker testified that employees who are going to miss work because of illness or a medical condition are supposed to call their supervisors and inform them of that fact. Walker also testified that Darling could have paged a supervisor on the day she brought the note in. Walker also could have paged a supervisor.

That night, Darling's supervisor, Joyce Chappel, called her at home at ten after 11 pm. Chappel asked if Darling was coming to work. Darling said no and told her about taking the doctor's note to the facility that afternoon. They talked about when Darling would be coming back and the conversation ended when Chappel said that no one had told her that Darling was not coming in.

The following morning Darling called Walker and asked what happened as Walker was supposed to take care of handling the note. Walker cut her off and put the Assistant Director of Nursing, Jan Sharp, on the line. According to Darling, Sharp stated that Darling was a no call, no show and had left her staff short. Darling explained about leaving the doctor's note with Walker. Sharp accused her of not knowing or not reading the facility's policy for calling in doctor's notes. Sharp asked if she had read the employee handbook. Darling thought she was speaking of a Vencor handbook and said she had not received one, though she had a handbook issued by Vencor's predecessor. Sharp said she was sick of Darling's crap and thought that Darling should be reoriented. Darling said fine, if you want to reorient me, reorient me. Sharp then said she thought Darling's nursing skills should be reassessed more closely. Darling took umbrage at this remark and said she had been a full time night nurse for seven years was probably the best night nurse they had. Sharp snickered and said she was going to talk with Manqual about the situation and would get back to Darling.

Sharp testified and had a different version of what transpired. She testified that in the morning after Darling was considered a no call, no show, she was informed about the situation by Darling's supervisor, who told her that Darling had claimed to have turned in a doctor's note the previous day. Sharp had not seen such a note. Sharp called Manqual who was at home that day and was instructed to call Darling. It strikes me as strange why Sharp would have called Manqual. From Darling's supervisor, she knew that Darling would not be in for several days and that a substitute would have to be found, something that she was capable of doing without Manqual's input. And in fact, that is not what she and Manqual talked about. They only talked about investigating the no call, no show aspect of the situation.

According to Sharp, she asked why Darling had been a no call, no show the night before. Darling explained she had brought in a doctor's note and had given it to Walker. Sharp asked why she had given the note to Walker and according to Sharp, Darling had no clear answer. This strikes me as strange as both Darling and Walker agreed that Walker had indicated to Darling that she would take care of everything and give the note to the proper

person. Sharp testified that she asked Darling why she had not sought her out. Darling answered that she did not know that she had to. Sharp responded that it was part of the facility's policy and procedure which was set out in the employee handbook. Darling said she had never gotten a handbook, and Sharp challenged this assertion. Sharp then told her that even with a doctor's note that she had to call in and report her planned absence to a supervisor. Sharp then pointed out some earlier instance where she believed Darling had failed to know procedure. According to Sharp, Darling raised her voice and said she was a good nurse and no one else had a problem with her knowledge of policy and procedure. Sharp responded that she would check to see if there was a receipt for a handbook in Darling's personnel file and at that point Darling hung up.

As between the two versions of the telephone call, I credit Darling's. Sharp's assertion that Darling had no clear answer as to why she left the doctor's note with Walker is suspect. Given either Walker's version of her meeting with Darling or Darling's version, which I credit, Walker gave every indication to Darling or any rational person, that she was going to take care of the matter. Clearly Darling had every reason to believe this meant telling management about it and that Darling was not coming in that day, or for the next several days. This would have had to have been part of the conversation. However, the events that followed shows Manqual and Sharp had their blinders on and did not want to be distracted from their goal, getting rid of Darling.

According to Sharp, she then went to Walker and asked if Darling had given her a note. Walker said she had, and that she had put it in the OSHA nurse's box. It should be remembered that Walker testified no one asked her about the note until after Darling had been terminated. In this apparent conflict between persons on the side of management, I credit Walker as she certainly would not tell a lie that likely would get her into trouble with her employer. Sharp then called Manqual and told her that Darling had become angry and had hung up on her. She added that Darling admitted that she did not know that she had to call in or give the doctor's note to a supervisor. Manqual told Sharp to call Darling back and have her come in for a meeting the next day.

Darling testified that she received a call the following day from Manqual, who asked that Darling stop by the facility.[16] Darling went to Nutmeg and went into Manqual's office. Mangual was present as was the facility's day supervisor, Barbara Turner. Mangual was going over the question of Darling's no call, no show. Turner stated that Darling had been rude with Sharp on the phone the previous day. Darling asked how she knew what had been said. Turner said she had overheard part of the conversation and that Sharp was being nice to Darling. At this point, Manqual dismissed Turner from the meeting and told Darling that it did not matter, as she was being discharged for being a no call, no show.[17] Darling said fine, that she had enjoyed working at Nutmeg and asked for her pink slip. Darling was also given a discharge notice. This notice gave the reason for discharge as "violation of absenteeism policy." [18]It also notes that Darling

[16] This apparently innocuous difference in the testimony of Sharp and Darling is significant to the degree that nothing was offered by either side about this conversation. If Sharp had called back, and had the earlier conversation gone as described by Sharp, surely there would have been some mention of the alleged hanging up or other rudeness. There was none and I credit Darling that Mangual called her.

[17] Neither Mangual nor Turner disputed this testimony. Turner, though testifying, offered no evidence about this meeting or the allegedly rude manner in which Darling treated Sharp on the telephone. She certainly did not support Sharp's allegation that Darling hung up on her.

[18] Respondent's employee handbook notes that the first instance of a no call, no show will

Continued

turned in a doctor's note to the payroll clerk and that the nursing supervisor and Administrator were unaware of the note. It also notes that the supervisor called on the first night covered by the note and was told of its existence. It also claims Darling was insubordinate in her conversation with Sharp.

Mangual testified that she made the decision to terminate Darling. She denied any knowledge of Darling's involvement in the Union campaign or her Union sympathies. She testified that Darling was fired for her no call, no show, and her alleged insubordination to Sharp. She described how she instructed Sharp to call Darling. She testified that after the call, Sharp told her that Darling did not know she had to seek out a supervisor with the doctor's note. Sharp said she had told Darling that she had a problem with Darling's lack of knowledge of procedure and that Darling had gotten angry and hung up. Sharp told Manqual she thought Darling was insubordinate.

Manqual testified she then decided to review Darling's records. She met with Darling the next day. Mangual testified she told Darling that she was aware of the conversation between Darling and Sharp the previous day, she was aware that Darling was unaware of the procedure for reporting a planned absence. She showed Darling a receipt Darling had signed for the employee handbook. Mangual said Darling was a no call, no show. Darling said she had brought a note in to Walker and Manqual asked why she took it to the payroll benefits coordinator and Darling said she did not know that she had to do anything different. Mangual then said because of her insubordination, her no call, no show and her probationary status, she was discharged. No one in management looked at the doctor's note before Darling was terminated nor did anyone interview Walker about the circumstances surrounding Darling's delivery of the note to the facility.

C. Conclusions

Section 7 of the Act provides that employees have the right to engage in union activities as well as "other concerted activities for the purpose of collective bargaining or other mutual aid or protection.", and Section 8(a)(1) prohibits interference with, restraint or coercion of employees exercising those Section 7 rights. Section 8(a)(3) of the Act bars employment discrimination based on anti-union motivation. Further, where an employer terminates or disciplines an employee based on animus against an employee's concerted activities which are protected by Section 7, but which do not involve union activities, per se, such constitutes a violation of Section 8(a)(1) of the Act. See, e.g., *Salisbury Hotel,* 283 NLRB 685, 687 (1987); *Meyers Industries,* 268 NLRB 493, 497 (1984).

Where a violation of Section 8(a)(1) is alleged based on protected concerted activities, and/or where a violation of Section 8(a)(1) and (3) is alleged based on union activities, the General Counsel bears the burden of proving by a preponderance of the evidence that an employee's union membership, activities or other conduct protected by Section 7 was a substantial motivating factor in the employer's adverse action against that employee. This proof, which normally includes proof of protected activities, employer knowledge of those activities, employer animus against those activities, and adverse action against the alleged discriminatee, constitutes the General Counsel's *prima facie* case. Once the General Counsel has made a *prima facie* case that an employee's protected conduct was a motivating factor in the employer's decision, the burden shifts to the employer to show that it would have taken the same action even absent the protected conduct. *Wright Line, a Division of Wright Line, Inc.,* 251 NLRB 1083

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result in a written warning and the second such instance will result in termination.

(1980); *Meyers Industries,* supra at 497 fn. 23; *Kysor Industrial Corp.,* 309 NLRB 237 (1992). A finding of pretext would leave intact the discriminatory motive established by the General Counsel. *Limestone Apparel Corp.,* 255 NLRB 722 (1981).

As noted above, Darling was very active in the campaign that occupied the last six months of 1996. She was the main Union organizer on the night shift, and solicited Union authorization cards outside the facility on several occasions. Her support of the Union was known to Respondent by the openness of her activities, by her wearing a Union button at work in the presence of supervisors, and by her statements at a management-run meeting attended by either Mangual or Murphy. During the campaign, on one occasion management brought in some members of management at another facility who met with the night shift, including Darling. Either Manqual or Murphy was also in attendance. One of the management speakers noted his facility was unionized and that it was not all that it was cracked up to be. They reminded the employees of the possibility of strikes. The employees were asked if there was a change in employees because of the campaign. Darling responded that employees were happier now. Management asked if it was because of what Nutmeg was doing for them. Darling answered no, that because of the Union effort, employees felt they finally had a chance to get what they want.

Mangual denied personal knowledge of Darling's union sentiments. I seriously doubt this assertion because of the openness with which Darling expressed her sentiments. In any event, either Murphy, who was consulted before Darling was terminated, or Mangual, were at the meeting noted above and one of them clearly knew of Darling's sentiments regarding the Union. As will be demonstrated below, Darling's supervisors knew of her sentiments and such knowledge can be imputed to Respondent by their supervisors' knowledge. *Quality Control Electric, Inc.,* 323 NLRB No. 29 (1997). I find that Respondent had knowledge of Darling's Union sympathies and at least some of her Union activities.

General Counsel offered certain evidence of events occurring during the campaign to establish employer animus toward the Union and its supporters. LPN Nancy Burdick, who worked for Nutmeg for 28 years, until she was discharged in March 1997, was under the supervision of Sharon Breton and Mary Anderson during the campaign. She testified that at the outset of the campaign in the Summer of 1996, Breton told Burdick that she had attended management meetings and had been instructed to watch for any union activity and report any such activity to management. This message was also given to Burdick by her other supervisor, Anderson and by a part-time supervisor, Marie Boiselle. Breton, Anderson and Boiselle each testified in response to leading questions that they had never told any employee that they had been instructed to observe and report to management any union activity on the part of employees.

CNA Aida Rodriquez worked at Nutmeg from March 1990 until January 1997, when she was discharged. In the summer of 1996, during the campaign, Rodriquez was working and was approached by Administrator Murphy and Director of Nursing Manqual. According to Rodriquez, Murphy introduced Manqual, who had just been hired, and then told Rodriquez that she had heard that Union cards were being signed and that Rodriquez was getting them signed. Rodriquez replied that the card signing was already done. Murphy testified with respect to this conversation that an employee had complained to her that Rodriquez was soliciting employee signatures on authorization cards in patients' rooms. She testified that she and Mangual approached Rodriquez and she told her about the complaint. According to Murphy, Rodriquez denied any involvement in soliciting cards. Murphy then told her that patients' rooms were not

an appropriate place to solicit and that there were other places this could be done.[19]

Rodriquez also testified that she attended management meeting with employees where the topic of the meeting was the union campaign. At one such meeting she spoke up and was told to shut up by Murphy. Rodriquez had been asking if, as they were being told by management, the Union could not do anything for employees, why was management wasting so much time and effort on the meetings. Murphy denied ever telling Rodriquez to shut up or ever preventing Rodriquez from speaking at a meeting.

Shortly after the union campaign started, Darling had a conversation with supervisor Boiselle in the break room at Nutmeg. Boiselle told her that she had attended the first union meeting thinking she could support the union. However, she had been told by management that she was a supervisor and could not have anything to do with the Union. Boiselle was also instructed by management to discourage Union talk among the employees and to report back any union activity. Supervisors Breton and Mary Anderson subsequently had a similar conversation with Darling. As noted, each of these supervisors expressly denied having such a conversation with any employee. I credit the testimony of Burdick, Rodriquez and Darling over the rote denials of the supervisors in response to leading questions. When cross examined, the supervisors and especially Boiselle, gave answers which if not contradicting their direct testimony significantly modified it.

On one occasion during the campaign, Darling was speaking to Murphy on another subject when Murphy accused Dale Munn and Nancy Burdick of stealing Murphy's resume. The subject then shifted to the Union, with Murphy commenting, "It is a meat cutter's Union for cripe's sake. That the union could only do what was black and white. They couldn't handle any grey areas. That Nutmeg was a small corporation -- a small company and they took care of their people. " Murphy then reminded Darling of things in her past at work where Murphy felt the Respondent had stood behind Darling and taken care of her. Murphy also commented that if the Union got in the employees could lose benefits such as pay and holidays instead of getting more, and pointed out the possibility of strikes. Murphy ended by saying it would be a horrible thing if the Union got in.

Murphy testified that she did meet with Darling and in an explanation of the negotiating process told her benefits could go up, go down or stay the same. She told Darling of the potential for strikes. She did not contradict the other things that Darling attributed to her in her description of the conversation.

Anti-Union animus is evidenced by the supervisors' statements to employees indicating Respondent's instructions to engage in surveillance of the employees' Union activity, conduct which would violate Section 8(a)(1). *Consolidated Edison Co. v. NLRB,* 305 U.S. 197. It is irrelevant if the supervisors balked at the instruction or did not act on it. It is the message that was given to employees, and the instruction, that was at the root of the message, that demonstrates the animus. Even if their own supervisors were rejecting their instruction, employees could still fear the orders would be followed by other supervisors or members of management, so there remained at least the impression of surveillance. *NLRB v. Prince Macaroni Mfg., 329 F.2d 803 (CA 1 1964).* More importantly for this case, an inference can reasonably be drawn that the reports of Union activities were being collected for some purpose.

[19] In an affidavit given the Board, Murphy denied meeting with Rodriquez with Manqual present and denied asking Rodriquez if she was still collecting cards. She mentioned nothing about an employee complaining about Rodriquez in the affidavit.

Thus, when a Union activist is terminated, the evidence about collecting information about Union activities is one piece of evidence establishing an anti-union motivation for that termination.

Further evidence of animus is found in Respondent calling Rodriquez aside to speak alone to her about card signing. Such was an intimidating and coercive technique, and use of such a technique is indicative of an employer bent on avoiding unionization.

Background evidence of Respondent's anti-union animus is also found in its granting of wage improvements during the critical period between the Union petition filed in May 1996 and the first CNA election held on July 11, as established by the Board's November 8, 1996 Decision, Order and Direction of Second Election. The Board's finding of objectionable conduct is *res judicata* of the matter on which the Hearing Officer relied, and thus, that conduct may be considered as evidence of Respondent's animus in the instant case. *Wolverine Worldwide, Inc.,* 242 NLRB 425, 427 (1979); *Barnes & Noble Bookstores,* 237 NLRB 1246 (1978).

Further evidence of animus is found in Murphy's comment made during a one on one conversation with Darling about the effects of organizing, that it would be a horrible thing if the Union got in.

Though I believe as set forth above, that Respondent harbored anti-Union animus, I believe the driving force or motivating factor in its discrimination against Darling was her protected concerted activity of soliciting support for fellow employee Quinn Easterling and her subsequent submission to Respondent of her letter and the statements of three co-workers in support of Easterling. To the extent that Union animus played a role in Respondent's treatment of Darling, it could have only aggravated Respondent's actions against Darling. I have already found that Darlings solicitation of employees on behalf of Easterling and her letter were concerted protected activities under Section 7 of the Act. For the reasons set forth earlier in this decision, I have found that discipline issued to Darling on February 12 was motivated by this protected activity and that the professed reasons for the discipline were pretextual. I have similarly found that the absenteeism warning purported given to Darling on February 12, was not in fact given to her and was made up to support the discharge of Darling for an alleged absenteeism policy violation on April 22.

Looking now at the discharge itself, I have found that Respondent violated Section 8(a)(1) of the Act by placing Darling on probation for engaging in protected concerted activity. The probationary status of Darling is tied to her discharge as it gives Respondent an excuse to avoid its written disciplinary policy of giving a warning to an employee for the first instance of no call, no show and skip to the discipline for a second violation of this policy, to wit, discharge.

The actions of Mangual and Sharp in the events surrounding Darling's discharge evidence a pre-existing desire to rid themselves of Darling. At most, Darling and Walker miscommunicated and there was a good faith misunderstanding about the purpose of Darling giving the doctor's note to Walker. Based on Walkers statement that she would take care of everything, Darling had every reason to believe that her intended absence would be reported to supervision in accordance with Respondent's policy. Walker evidently misunderstood its purpose and thought is was being delivered in accordance with Respondent's policy that absences extending over three working days required the submission of a doctor's note. Clearly Darling was making a good faith effort to notify Respondent of her anticipated absence and comply with Respondent's policies. Equally clearly, it made no difference to Manqual and Sharp.

As soon as Sharp learned of the purported no call, no show, and the information about

the existence of a doctor's note in Respondent's office, she called Manqual at home. There was no need to take this step to secure a replacement for Darling. And as she knew Darling would not return until after April 26, there was no rush to do anything. Significantly, she made no attempt to find the note and no attempt to speak with Walker, who worked in an office nearby, to determine the circumstances under which the note had been given to Respondent. For her part, Manqual conducted an "investigation", not into the circumstances of the note being given to Respondent, but into Darling's personnel file to determine her disciplinary status. The focus of the "investigation" is telling. There is no attempt to see if Darling was telling the truth and had attempted to notify management of her absence, there was only an attempt to bolster a decision to terminate.

Perhaps Manqual, Sharp and others in management can rationalize that Darling was a no call, no show, but I certainly cannot. An ill woman on medication comes to the facility in an attempt to turn in a doctor's report to the Director of Nursing. She is gone and another person in the office to whom doctor's notes are routinely turned in offers to take the note and take care of everything. Darling turns it over and believes logically that everything is fine. Only someone intent on finding a reason to punish Darling could find that she did anything in violation of Respondent's policies. Under the circumstances, I believe Darling was in compliance with Respondent's policies and that Respondent seized upon a perceived technical non-compliance to have an excuse to fire her.

The matter of Darling's "insubordination" also rankles. This was clearly a secondary reason given for her discharge. This secondary nature of the alleged conduct by Darling is because Darling did not hang up on Sharp and was not insubordinate to her. Darling simply resisted Sharp's challenge to her nursing skills, defended herself, and defended her conduct with respect to attempting to provide proper notice to Respondent of her absence. Indeed, Sharp's vigorous attack of Darling is indicative of Sharp's motivation to get rid of Darling. In any event, the absence of any real concern on the part of Respondent about the claimed insubordination is further disclosed in Manqual's comments to Darling at the termination interview, when Darling and Sharp exchanged comments about the claim that Darling had been rude, Manqual remarked that that was neither here nor there, that she was terminating Darling for being a no call, no show.

I find that as with the discipline issued Darling by Manqual on February 12, the reason for her termination on April 25 was motivated by Darling's protected concerted activity in February. No legitimate reason was advanced for Darling's termination other than the pretextual ones of insubordination and no call, no show. Had Respondent had any legitimate concerns about the situation, it would have interviewed Walker and checked into the doctor's note. That it did neither clearly shows that it did not care about the circumstances, its mind was already made up to fire Darling. In the absence of any legitimate reason being advance for Darling's termination, and in light of Respondent's clear unlawful discrimination against her on February 12, and its manufacture of the absenteeism warning of the same date, I find that it was motivated by Darling's protected concerted activity discussed at length above and find that Respondent's action violates Section 8(a)(1) of the Act. Though I find that Respondent harbored Union animus, I do not believe a sufficient nexus is established in this record to justify a separate finding that it discharged Darling for engaging in Union activity. Accordingly I do not find Respondent violated Section 8(a)(3) of the Act.

Conclusions of Law

1. Respondent, First Health Care Inc., d/b/a Nutmeg Pavilion Health Care Facility, a

Wholly Owned Subsidiary of Vencor, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a heath care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by placing its Leanne Darling employee on probation on February 12, 1997 and by discharging her on April 25, 1997 because she engaged in concerted protected activity under Section 7 of the Act.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employee Leanne Darling on April 25, 1997, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent discriminatory disciplined Leanne Darling on February 12, 1997 by placing her on probation. Respondent must be ordered to rescind this discipline.

The Respondent should be order remove from its files any reference to its unlawful discipline issued to Leanne Darling on February 12, 1997 and its unlawful discharge of her and inform her in writing that this has been done and that the unlawful discipline and discharge will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, First Health Care Inc., d/b/a Nutmeg Pavilion Health Care Facility, a Wholly Owned Subsidiary of Vencor, Inc. of New London, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. disciplining employees to include placing them on probation for engaging in concerted protected activities under Section 7 of the Act.
b. discharging employees for engaging in concerted protected activities under Section 7 of the Act.
c. In any like or related matter, interfering with, restraining or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

a. Within 14 days from the date of this Order, offer Leanne Darling full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.
b. Make Leanne Darling whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.
c. Within 14 days of this Order, rescind the discipline issued to Leanne Darling on February 12, 1997, in which she was placed on probation.
d. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and unlawful discharge and notify the employee in writing that this has been done and that the discipline and discharge will not be used against her in any way.
e. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.[21]
f. Within 14 days after service by the Region, post at its facility in New London, Connecticut copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[21] On brief, General Counsel makes a request supported by a number of arguments that the Board's standard backpay language needs to be changed. This is not a matter that is fact specific to this case and I believe it is a policy decision which is totally within the Board's discretion. General Counsel is invited to take exception to my failure to address this matter and make her arguments directly to the Board in her exceptions.

[22] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

employees employed by the Respondent at any time since October 14, 1997.

g. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Wallace H. Nations
Administrative Law Judge